No. 78-1174

In the Supreme Court of the United States

OCTOBER TERM, 1978

TAXATION WITH REPRESENTATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners challenge the constitutionality of Section 170(c)(2) of the Internal Revenue Code of 1954 and other similar statutes, which permit deductions for charitable contributions to certain nonprofit organizations on the condition that the recipient organizations refrain from substantial lobbying activities.

The pertinent facts are undisputed and may be summarized as follows: Petitioner is a nonprofit corporation organized "[t]o promote social welfare within the meaning of [Code] Section 501(c)(4)," by "appearing on behalf of the public at legislative and administrative hearings on Federal tax matters and by assisting members of the academic community in presenting their views at such hearings" (Pet. App. 8a). Section 170(c)(2) of the Code allows an income tax deduction for charitable contributions to organizations which are "organized and operated" exclusively for charitable purposes, provided that "no substantial part of [their] activities * * * is

carrying on propaganda, or otherwise attempting, to influence legislation." Virtually identical lobbying restrictions are contained in other charitable deduction provisions in the Code,[1] as well as in Section 501(c)(3) which exempts certain charitable organizations from the income tax. Section 501(c)(4) exempts "social welfare" organizations from income tax whether or not they engage in lobbying. However, only organizations that do not engage in substantial lobbying are entitled to receive tax deductible contributions. See, generally, *Commissioner* v. *"Americans United" Inc.*, 416 U.S. 752 (1974).

Petitioner is organized and operated primarily to engage in lobbying and therefore is not eligible to receive tax-deductible contributions. It contends that the lobbying restrictions that result in its classification as a social welfare organization under Section 501(c)(4) rather than a charitable organization under Section 501(c)(3) violate its right to free speech and equal protection. Petitioner brought this suit in the United States District Court for the Eastern District of Virginia for refund of federal unemployment taxes to which Section 501(c)(4) organizations are subject but Section 501(c)(3) organizations are exempt. The courts below upheld the constitutionality of the statutory restrictions against substantial lobbying activities by charitable organizations (Pet. App. 2a, 13a-15a).

1. In *Cammarano* v. *United States*, 358 U.S. 498 (1959), this Court upheld the constitutionality of restrictions in the Internal Revenue Code on business expense deductions for lobbying. In so ruling, the Court referred to the similar restriction on lobbying by tax-exempt organizations at issue here and concluded that there was no constitutional bar against Congress' refusal to subsidize lobbying activities in the tax laws. As the Court stated (358 U.S. at 513):

[1]Section 2055(a)(2), 2106(a)(2), 2522.

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not " 'aimed at the suppression of dangerous ideas.' " * * * Rather, it appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned.

The court of appeals therefore correctly concluded that this case is controlled by *Cammarano*. As it observed, "[i]n our opinion, *Cammarano* makes it clear that [petitioner's] freedom of speech and right to petition Congress are not impaired by the lobbying proscriptions of Section 501(c)(3) and Section 170(c)(2)" (Pet. App. 14a).

Moreover, since *Cammarano* the constitutionality of the identical lobbying restriction in the charitable exemption and deduction statutes has been upheld by every appellate court that has considered the question. *Haswell* v. *United States*, 500 F. 2d 1133 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975); *Christian Echoes National Ministry, Inc.* v. *United States*, 470 F. 2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973); *"Americans United" Inc.* v. *Walters*, 477 F. 2d 1169, 1182 (D.C. Cir. 1973), rev'd on other grounds *sub nom. Commissioner* v. *"Americans United" Inc., supra.*[2]

[2]*Haswell* and *Christian Echoes* involved both First and Fifth Amendment contentions. *"Americans United"* addressed only a First Amendment challenge.

2. Petitioner contends (Pet. 7-8) that there is no compelling justification for the neutrality of the Internal Revenue Code with respect to lobbying expenses. But no such justification is required because Congress has not prohibited such activities, but has simply refused to subsidize them through tax benefits. *Cammarano* v. *United States, supra*; see *Broadrick* v. *Oklahoma*, 413 U.S. 601, 616-617 (1973); *CSC* v. *Letter Carriers*, 413 U.S. 548, 564 (1973); *Maher* v. *Roe*, 432 U.S. 464, 475-477 (1977). *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), upon which petitioner heavily relies (Pet. 7), is therefore distinguishable. There, the Court struck down a criminal statute generally prohibiting specified business corporations from underwriting lobbying activities. This case involves no comparable absolute prohibition of lobbying.

Petitioner further argues (Pet. 9-10) that the post-*Cammarano* enactment of Section 162(e) destroys the neutrality of the Internal Revenue Code with respect to lobbying expenses upon which that decision relied. Although Section 162(e) prohibits business expense deductions for political campaign and "grass-roots" lobbying expenditures, it permits deductions for a narrow category of business expenses incurred in appearing before or submitting statements to legislative bodies concerning legislation of direct interest to the taxpayer.

But as the Court of Claims in *Haswell* correctly pointed out, the limited deduction allowed by Section 162(e) can be justified on the grounds that (1) expenses for direct lobbying relate to income-producing activities, and an accurate measure of net income supports some deduction; (2) similar expenses for administrative and judicial appearances are deductible; and (3) it is desirable for legislative bodies to have readily available information on the impact of proposed legislation on the trade or business of affected taxpayers.

These considerations do not apply to the activities of tax-exempt organizations such as petitioner or their donors. Indeed, Congress has a legitimate interest in preventing individuals from making tax-deductible contributions to finance lobbying activities through charities that are exempt from taxes. However, as we have pointed out, *supra*, page 4, the prohibition is not absolute, for even such exempt organizations are allowed to engage in insubstantial lobbying activities and non-partisan analysis of public issues.[3]

3. Finally, petitioner argues (Pet. 12-15) that allowance of certain tax deductible contributions to fraternal and veterans organizations that lobby constitutes unconstitutional discrimination. With respect to fraternal groups, Sections 170(c)(4) and 2522(a)(3) do not allow tax deductible contributions to the organizations themselves. As the court of appeals correctly recognized (Pet. App. 15a), these provisions only permit such organizations to receive tax deductible contributions for distinct funds that are used exclusively for non-lobbying charitable purposes without requiring the formal establishment of a separate Section 501(c)(3) charitable organization.[4]

The provisions governing nonprofit veterans organizations allow tax deductible contributions to such groups organized in the United States without regard to their lobbying activities. See Sections 170(c)(3), 2055(a)(4), 2522(a)(4). But the special tax treatment of veterans organizations arises from significant and compelling governmental concerns. Military personnel and veterans are granted substantial benefits by the national and state legislatures to compensate them for

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[3]See Section 53.4945-2(d)(1)(ii) of the Foundation Excise Tax Regulations (26 C.F.R.).

[4]The dissenting opinion therefore errs in stating (Pet. App. 18a) that fraternal organizations may use tax deductible contributions to lobby for charitable purposes.

disruption of civilian pursuits; to assist the readjustment to civilian life; to make military service more attractive; and to reward those who have served their country in time of peril. *Russell* v. *Hodges*, 470 F. 2d 212, 218 (2d Cir. 1972) (Friendly, J.). See also *Fredrick* v. *United States*, 507 F. 2d 1264, 1266-1267 (Ct. Cl. 1974); *Bannerman* v. *Department of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch* v. *Du Bois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Feinerman* v. *Jones*, 356 F. Supp. 252 (M.D. Pa. 1973) (three-judge court); *Koelfgen* v. *Jackson*, 355 F. Supp. 243, 251-252 (D. Minn. 1972) (three-judge court), aff'd mem., 410 U.S. 976 (1973); cf. *Johnson* v. *Robison*, 415 U.S. 261, 378-383 (1974). Compare *Personnel Administrator of Massachusetts* v. *Feeney*, No. 78-233 (argued Feb. 26, 1979). Since these benefits are provided by the legislatures, it is reasonable for Congress to allow veterans organizations to engage in lobbying activities to preserve their benefits without risk of losing their tax deductible contributions. As the court of appeals correctly concluded (Pet. App. 15a), "[t]he unique and compelling societal and governmental goals served by * * * [veterans] organizations provide ample justification for the special tax treatment extended to them by the Congress."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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